

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

**BAVARIAN NORDIC A/S**

Plaintiff,

v.

**ACAMBIS INC. and**

**ACAMBIS PLC,**

Defendants.

**C.A. No. 05-614 (SLR)**

**APPLICATION FOR ISSUANCE OF TWO LETTERS OF REQUEST TO THE  
FEDERAL MINISTRY OF JUSTICE OF THE REPUBLIC OF AUSTRIA ON THE  
TAKING OF EVIDENCE REGARDING BAXTER HEALTHCARE SA**

Plaintiff, Bavarian Nordic A/S (“Bavarian Nordic”), hereby requests that this Court issue two Letters of Request on the Taking of Evidence Abroad in Civil or Commercial Matters pursuant to Federal Rule of Civil Procedure 28(b) (“Rule 28(b)”). The attached two Letters of Request are directed to the Federal Ministry of Justice of Austria. One is to be forwarded to the District Court (*Bezirksgericht*) of Gänserndorf Austria for the purpose of securing *Dr. Falko-Günter Falkner* as a witness for deposition. Dr. Falkner is a citizen of Austria and, upon information and belief, has his residence within the judicial district of the District Court. The other Letter of Request is to be forwarded to the District Court of Vienna for the 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> District (*Bezirksgericht Wien Josefstadt*) for the purpose of securing *Dr. Wolfgang Mundt* as a witness for deposition because he has his residence in the 7<sup>th</sup> District of Vienna. Dr. Falkner and Dr. Mundt are citizens of Austria and, upon information and belief, have residence within the judicial districts of the above-mentioned District Courts. Their testimonies are highly material to this case. As explained below, issuance of the attached Letters of Request are both procedurally proper and necessary to the fair adjudication of this dispute.

# **I. Issuance of the Attached Letters of Request is Procedurally Proper**

The attached Letters of Request satisfy the procedural requirements for securing Dr. Falkner's and Dr. Mundt's individual deposition testimonies in this case, according to the Federal Rules of Civil Procedure. In relevant part, Rule 28(b) authorizes the taking of depositions in a foreign country "(1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request. . ." *See* Fed. R. Civ. P. 28(b). Austria is not a party to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters or to any bilateral Mutual Legal Assistance Agreement in Civil Matters with the United States. However, Section 38 para. 1 of the Austrian Judicial Act ("*Jurisdiktionsnorm*") requires any Austrian court to provide judicial assistance to foreign courts even in the absence of a treaty. The attached Letters of Request are drafted and captioned in the form suggested by the Hague Conference. (*See* Model for letters of request recommended for use in applying the Hague Conference on Private International Law 1985.)

The attached first Letter of Request is directed to the Ministry of Justice of Austria (*Justizministerium*) to be forwarded to the Austrian District Court (*Bezirksgericht*) of Gänserndorf because Dr. Falkner's residence, upon information and belief, is at Neusiedlzeile 76a, A 2304 Orth/Donau. Orth falls within the local district of this court.

The attached second Letter of Request is directed to the Ministry of Justice of Austria (*Justizministerium*) to be forwarded to the Austrian District Court (*Bezirksgericht*) of Josefstadt in Vienna because Dr. Mundt's residence, upon information and belief, is at Florianigasse 57, A 1080 Vienna (Wien) which falls within the local district of this court. As such this Court may

issue the attached Letters of Request to the District Court, requesting that the District Courts assist in compelling Dr. Falkner's and Dr. Mundt's separate testimonies.

Finally, Rule 28(b) requires that a letter of request be issued on terms that are "just and appropriate." Those criteria are met in this case. The attached Letters of Request seek an order compelling Dr. Falkner and Dr. Mundt to present themselves for deposition at the District Court in their district and delineate the precise scope of the questions each of them will be expected to answer. (*See* Attachment A to each of the two Letters of Request.) According to Austrian procedural law, a judge of the District Court will oversee each deposition in the judge's chamber and ask each witness questions. Moreover, Dr. Falkner or Dr. Mundt may each have his/their own counsel(s) in attendance at each of the depositions, who will be allowed, as Plaintiff's counsel, to ask additional questions. Dr. Falkner and Dr. Mundt will be reimbursed for their reasonable travel expenses to their depositions – the courts are located very closely to their residences. The examinations by the two District Courts will completely separate and be recorded either by audio recording, video recording, or stenography, and this recording will be sent to the representatives of the parties, with a copy sent directly to this Court. As such, the proposed deposition procedures under the Letters of Request are "just and appropriate."

## **II. Issuance of the Attached Two Letters of Request is Necessary in this Case**

Moreover, issuance of the attached two Letters of Request is necessary for the fair adjudication of this lawsuit. Upon information and belief, Baxter Healthcare SA appears to have produced MVA 3000 samples and it is from the documents produced by Acambis that Baxter Healthcare SA has more than a peripheral role as a manufacturer with regard to MVA 3000. For example, Baxter commissioned Vivacs GmbH in Martinsried, Germany to perform a study of the replication characteristics of various MVA strains, including the alleged infringing product MVA

3000 and the patented strain MVA-BN. Moreover, the deposition testimony of several witnesses in a parallel proceeding before the International Trade Commission reveals that Dr. Falkner has been a key researcher and research director of Baxter Healthcare on vaccines for many years. Dr. Falkner has also worked for the National Institutes of Health in the United States at an earlier stage of his career for more than two years. Dr. Mundt is the Vice President of Process Development of Baxter Healthcare and, having worked for this company for more than six years, has been involved in many matters regarding MVA and may have substantial knowledge of the development of MVA at Baxter, MVA-BN and all communications between Baxter, the NIH and Acambis. Moreover, both witnesses may also testify about the role of Dr. Miles Carroll and his relationship with Baxter.

Thus, Bavarian Nordic believes that Dr. Falkner's and Dr. Mundt's testimonies will be highly material to the issues in this case. (*See* Attachment A to the Letters of Request - enumerating the subject matter about which Bavarian Nordic seeks Dr. Falkner's and Dr. Mundt's testimonies).

### **III. Conclusion and Request for Expedited Process**

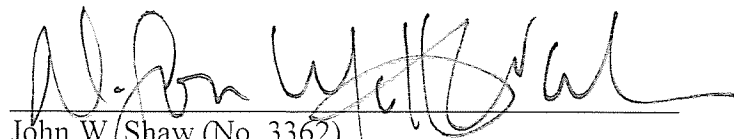
For all the foregoing reasons, issuance of the attached Letters of Request is proper and necessary in this case. Bavarian Nordic thus respectfully requests that this Court expeditiously sign and return the attached Letters of Request to Bavarian Nordic's counsel, who will promptly submit it to the US Department of State together with German certified translations, as required by Austrian law. The US Department of State will process the documents and will deliver the Letters of Request through the diplomatic channels. This means that the US Embassy in Vienna will deliver the documents to the Austrian Ministry of State (*Aussenamt*) that will forward the

Letters of Request to the Austrian Federal Ministry of Justice (*Bundesministerium der Justiz*).

The Federal Ministry of Justice will review the requests and then forward the Letter of Request regarding Dr. Falkner to the District Court of Gänserndorf and the Letter of Request regarding Dr. Mundt to the District Court for 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> District of Vienna (*Bezirksgericht Josefstadt*), along with such other documentation as required by Austrian law.

**YOUNG CONAWAY STARGATT & TAYLOR, LLP**

Date: July 21, 2006



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**CERTIFICATE OF SERVICE**

I, D. Fon Muttamara-Walker, Esquire, hereby certify that on July 21, 2006, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on July 21, 2006, I caused a copy of the foregoing document to be served on the above-listed counsel and on the following non-registered participants in the manner indicated:

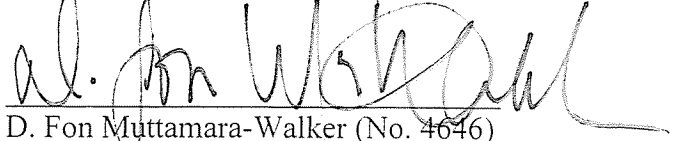
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A handwritten signature in dark ink, appearing to read "D. Fon Muttamara-Walker", is written over a horizontal line.

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